Filed 5/11/16 P. v. Martinez CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALBERT LEE MARTINEZ, Defendant and Appellant.	H039734 (Santa Cruz County Super. Ct. No. F21295)

A jury found defendant Albert Lee Martinez guilty of active participation in a criminal street gang (count one; Pen. Code, § 186.22, subd. (a));[1] possessing a weapon while in custody (count two; § 4502, subd. (a)); and assault with a deadly weapon (count three; § 245, subd. (a)(1)).[2] The jury also found true allegations that counts two and three were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)), and the trial court found that defendant had one prior serious felony conviction (§ 667, subd. (a)(1)). The trial court sentenced defendant to 23 years in prison.

Defendant argues his convictions must be reversed because: (1) his trial counsel provided ineffective assistance by not advancing the correct argument when moving to suppress his statements to the police as involuntary under the Fifth and Fourteenth Amendments to the United States Constitution; (2) the trial court abused its discretion by

[1] Unspecified statutory references are to the Penal Code.

[2] The information listed the criminal street gang for count one and the enhancements as: "Norteño / Clifford Manor Locos."

denying his motion to bifurcate trial on the gang charge and gang enhancements from trial on the other charges; (3) the trial court admitted testimonial hearsay as gang expert "basis evidence," which violated the Sixth Amendment's confrontation clause; (4) the trial court improperly permitted gang expert testimony regarding defendant's mental state; (5) the trial court violated the Sixth Amendment's confrontation clause by admitting contents of court records to prove a pattern of criminal gang activity; (6) the trial court abused its discretion by admitting unduly prejudicial evidence about defendant's prior convictions; (7) insufficient evidence supported the gang conviction and gang enhancements; (8) the trial court violated section 1170.1, subdivision (f) by not staying one of two five-year sentence enhancements related to count three; (9) the trial court violated section 654 by not staying the sentence for weapon possession; and (10) the foregoing errors were cumulatively prejudicial. For the reasons stated here, we will find no prejudicial error regarding defendant's guilt but will reverse the judgment and remand the matter for resentencing.

I. TRIAL COURT PROCEEDINGS

A. TRIAL EVIDENCE

In August 2011 defendant was an inmate at the Santa Cruz County main jail. He was housed in the "N unit," described by correctional officer Kyle Ward as an administratively segregated unit in the jail where Norteño members and affiliates are housed. Defendant shared cell number 20 with Alvaro Melendrez and Jesse Ybarra. Marcus Bates was housed in cell number 25. Both of those cells were on the top level of the two-level N unit.

1. August 8 Attack

Officer Ward let the inmates on the top tier out of their cells to go downstairs and pick up their lunches from Ward's partner, correctional officer Karen Wells. Ward observed the inmates' movements from the top tier. Wells testified that defendant seemed less friendly than usual when he took his lunch and did not make eye contact. As

defendant walked up one of the two staircases, Ward heard the sound of "metal on metal" coming from defendant's direction and saw defendant retrieve something from the stairs. Ward assumed defendant was picking up a piece of his lunch that he had dropped. Wells also heard something drop and saw defendant pick something up. Wells testified that the dropped object sounded heavier than food defendant received for lunch but did not sound like metal on metal.

While defendant was walking up the stairs, Ybarra walked past Ward. Ward assumed Ybarra was going to trade part of his lunch with another inmate. Ward then noticed a quick movement a few feet to his side and turned to see defendant trying to grab or hold onto Bates while Ybarra was trying to stab Bates with a blade that was roughly three inches long. Bates spun away from defendant. Ward pulled Bates behind him and away from the others. Ybarra walked away but defendant "sort of ran up" to Ward and Bates until Ward drew his taser and told defendant to back away. Ward called for backup and ordered the inmates to lock themselves in the nearest cell while Wells took Bates out of N unit.

Bates was taken to the infirmary, where he was treated for two lacerations. One was superficial but the other was deeper and required sutures. Ward and other officers searched the cells in N unit. No weapons were found in cell number 25 (the cell into which defendant was locked down immediately after the attack). In cell number 20 (where defendant, Ybarra, and Melendrez were housed before the attack), officers found no weapons but discovered several contraband items, including electrical wires, parts of a razor blade, and items used for tattooing. Ward testified that the amount of contraband found in cell number 20 was unusually large, comparable to the quantity officers might find in an entire unit. In cell number 27 (where Ybarra and another inmate were locked down), Ward found a piece of metal in the toilet that had one end filed down to make a sharp point.

2. August 9 Interview and Interrogation

Though not discussed at trial, defendant apparently invoked his right to silence on the same day of the attack (August 8). On August 9, defendant agreed to be interviewed by Sergeant Eric Montalbo and Commander Mario Sulay but that interview was also not admitted into evidence at trial.

Immediately after the Montalbo and Sulay interview, Sergeant Frank Gombos and Detective Jacob Ainsworth interrogated defendant. The version of the interrogation audio recording admitted at trial began with defendant stating "I, already, they read them to me already," apparently referring to an advisement under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).[3] Gombos informed defendant he wanted to read them to him again "to make sure you fully understand" them. Gombos recited the *Miranda* rights, and defendant indicated he understood them.

As the interrogation by Sergeant Gombos and Detective Ainsworth proceeded, defendant offered his version of the August 8 attack. He claimed Ybarra told him that Bates had assaulted Ybarra's niece. Ybarra said defendant "ain't a gangster" and challenged him to help attack Bates to " 'see where [defendant's] heart was.' " Defendant described his belief that Ybarra was going to use the attack on Bates as a pretext to attack him. Ainsworth asked if defendant was carrying "a shank at that time," and he confirmed he had one "[t]o protect myself" because he had felt tension from Ybarra, whom he characterized as a "straight killer." Defendant said he had a "piece" in his hand but faked the attack by swinging and missing Bates on purpose and that "if I was going to stick somebody, believe me, I'm going to stick somebody." Defendant explained his piece was made from a plastic shampoo or lotion bottle with a screw on the end, and that he had dropped it on the floor in front of Ward while walking upstairs

[3] Defendant challenges the admission of his interrogation statements, which we discuss in Part II.A.

before the attack. Defendant said Ybarra used a weapon that looked like a flat piece of metal during the attack on Bates.

3. Additional Trial Testimony

Officer Ward testified about his role as a classification officer at the jail, explaining that he was responsible for deciding where inmates are placed after they are booked. If inmates disclose they are Norteños or that they associate with Norteños, they are usually placed in the segregated N unit. Ward stated that if an inmate who was not "appropriate" was placed in N unit, they would "probably be asked to leave and they might be attacked." Based on his experience as a classification officer, Ward explained that the "CML" tattoo on both defendant and Ybarra stood for Clifford Manor Locos, "a northern gang set in Watsonville." A recording of the attack from a jail surveillance camera was admitted into evidence and played for the jury. Ward explained various elements of what the surveillance video showed.

Officer Ward recounted an incident in August 2011 when he escorted a maintenance person into N unit to fix one of the unit's two phones but agreed to delay the maintenance because an inmate was using the one functioning phone and asked to remain on the phone because the call was long distance. When Ward left he saw defendant tell the inmate on the phone something, which caused the inmate to hang up the phone. Defendant's ability to cause the other inmate to get off the phone suggested to Ward that defendant had a position of authority (or, the keys) in N unit.

Bates was called by the prosecution but was uncooperative. He denied that he had been assaulted, denied knowing defendant or Ybarra, and denied being a Norteño. He admitted having a previous conviction for battery and for being an active participant in a "northerner" street gang.

Detective Ainsworth testified as an expert on the subject of gang culture, gang practices, and recognition of gang members. Ainsworth had previously served as a classification officer at the jail, where he was "constantly in contact" with gang members

to make sure they were housed correctly. He stated that a gang member might attack someone directly in front of a correctional officer to show his commitment and loyalty to the gang. He stated that Norteños discipline members, often violently, for failing to obey superior members of the gang and that their planned attacks usually involve multiple people to increase the likelihood of success.

Ainsworth testified about defendant's tattoos, opining that the tattoo on his hairline above his forehead stating Familia Business was associated with the Nuestra Familia (the "supreme Norteño gang in the State of California"). The NF tattoo near defendant's left eye was an abbreviation for Nuestra Familia, suggesting to Ainsworth that defendant was a high ranking Norteño gang member. Based on Ybarra's and Bates's tattoos, Ainsworth stated he believed Ybarra was a high ranking Norteño whereas Bates was probably not a high ranking member. During Ainsworth's testimony, the jury heard audio from defendant's interrogation (accompanied by a transcript), and Ainsworth provided clarifying details.

Sergeant Morgan Chappell of the Watsonville Police Department testified extensively as an expert regarding gang recognition, practices, and culture.[4] Chappell testified about the Norteño gang generally; described investigations he personally conducted; and summarized police reports prepared by other officers. During Chappell's testimony, the court took judicial notice of court files about prior convictions related to the Norteño gang.

B. CONVICTION AND SENTENCING

The jury found defendant guilty of all three counts and found true the gang enhancements related to counts two and three. After a jury waiver, the court found true allegations that defendant had suffered one prior serious felony conviction for assault with a deadly weapon (§ 667, subd. (a)(1)) and had served five prior prison terms

[4] As Chappell's testimony is relevant to several issues on appeal, we will provide a more in-depth discussion in Part II.C.1.

(§ 667.5, subd. (b)). The court sentenced defendant to 23 years in prison, consisting of: principal term of six years for assault with a deadly weapon (§§ 245, subd. (a)(1), 667, subd. (e)(1); middle term doubled); two years consecutive for possessing a weapon while in custody (§§ 4502, subd. (a), 667, subd. (e)(1); one-third mid-term doubled); five years consecutive for the gang enhancement related to the assault count (§ 186.22, subd. (b)(1)(B)); one year consecutive for the gang enhancement related to the weapon possession count (§ 186.22, subd. (b)(1)(A); one-third mid-term); four years consecutive for prior prison terms (§ 667.5, subd. (b); one year for each of four terms); and five years consecutive for a prior serious felony conviction (§ 667, subd. (a)(1)).[5]

II. DISCUSSION

A. VOLUNTARINESS AND ADMISSIBILITY OF DEFENDANT'S INTERROGATION STATEMENTS

Defendant argues that the trial court violated the due process clause of the Fourteenth Amendment to the United States Constitution by admitting involuntary statements defendant made to Sergeant Gombos and Detective Ainsworth. Defendant alternatively contends that his trial counsel provided ineffective assistance to the extent trial counsel did not preserve the issue.

1. Motion in Limine

Defendant moved in limine to exclude all statements he made to Sergeant Gombos and Detective Ainsworth, arguing that the interrogation process violated his *Miranda* rights. According to that motion, defendant invoked his right to remain silent after the attack on August 8. The motion stated that the day after the attack, defendant was questioned while in custody at the sheriff's office by Sergeant Gombos and Detective

[5] The court imposed and stayed (§ 654) a two-year sentence for active participation in a criminal street gang (§ 186.22, subd. (a); middle term). The court also struck one of the prior prison term enhancements, apparently because one prior prison term allegation was based on the same conviction as the prior serious felony conviction allegation. (§ 1385.)

Ainsworth. The motion alleged Gombos and Ainsworth engaged in "rather extensive questioning of defendant before" providing a *Miranda* advisement, including the following statement by Gombos: "Well, it, it sounds like those guys are going to try and do what they can to help you out, but we're just going to ... finish this case up. And it's, very clearly, we can see what your involvement is, we can see what [Ybarra's] involvement is. And then, uh, your other cellie, I forgot what his name is, just takes a swing at Dude when he walks by. So ... the ... ."[6] (Ellipses in original.) Defendant responded: "All I did was swing at the guy." At that point, Gombos provided a *Miranda* advisement, defendant indicated he understood those rights, and the interrogation continued.

In his motion, defendant argued that all statements he made to Gombos and Ainsworth were inadmissible because Gombos and Ainsworth "employed the impermissible tactic of engaging in pre-*Miranda* advisement activities, conduct and conversations calculated (1) to 'soften-up' defendant to ultimately waive his *Miranda* rights when those rights were finally given to him, and (2) to get or to encourage defendant to talk about what occurred." (Citing *People v. Honeycutt* (1977) 20 Cal.3d 150, 158–161 ["When the waiver [of the right to silence] results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary."]; *Missouri v. Seibert* (2004) 542 U.S. 600, 609–610, plur. opn. of Souter, J. [finding two-step questioning technique—where interrogator purposely questions a defendant without providing a *Miranda* warning, obtains a confession, and then provides a *Miranda*

[6] By "those guys," Gombos was apparently referring to the interview by Sergeant Montalbo and Commander Sulay that preceded the Gombos and Ainsworth interrogation. Defendant's motion in limine did not mention that earlier interview.

warning before obtaining a second confession—renders both confessions involuntary and inadmissible]; see also *id.* at p. 620, conc. opn. of Kennedy, J.)

The prosecution's written opposition stated additional facts about the period leading up to defendant's interrogation by Gombos and Ainsworth. In the very early morning of August 9, defendant apparently demanded to use the phone at the jail. Later that morning, defendant "requested that he be interviewed" and was "transported from the jail to the Sheriff's Department." Defendant "voluntarily engaged in an interview" with Sergeant Eric Montalbo and Commander Mario Sulay. According to the opposition, "[p]rior to that interview it was agreed by all parties that the information provided would not be used to form the basis of a criminal prosecution."[7] Immediately after the Montalbo/Sulay interview, the interrogation by Gombos and Ainsworth took place.

The prosecution argued that there was no *Miranda* violation because defendant voluntarily initiated the questioning on August 9 and also because his discussion with Gombos and Ainsworth before the *Miranda* advisement was a "[c]asual conversation by an officer with an arrestee not intended to elicit incriminating responses ... ." (Citing *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1188–1189 ["Even if the suspect is readvised of his *Miranda* rights and waives them, his subsequent statements are inadmissible unless the suspect himself voluntarily initiated the subsequent statement."]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1034–1035 [finding substantial evidence supported trial court's finding that a "casual statement" by an officer was not a custodial interrogation].)

At the hearing on defendant's motion, the trial court asked defense counsel if it was necessary to have an Evidence Code section 402 hearing to determine "how it came about that [defendant] is interacting with law enforcement on" August 9, and defense counsel stated it was not. Defense counsel did not dispute that defendant "agreed to

[7] The specific terms of that agreement are not in the record on appeal.

come over" and talk to the police on August 9 despite having invoked his *Miranda* rights the day before; that defendant spoke with Montalbo and Sulay; that defendant was interrogated by Gombos and Ainsworth immediately after the interview with Montalbo and Sulay; and that the interview and interrogation occurred in the same room.[8] Defense counsel stated he had "listened to the disk of that interview" with Montalbo and Sulay and characterized it as "one of those things you provide us information and we'll see what we can do type of situation." Consistent with the in limine motion, defense counsel focused on the interrogation by Gombos and Ainsworth, arguing that the pre-advisement questioning was a custodial interrogation and that Gombos and Ainsworth's initial questions were "a sort of softening up," bringing the interrogation "within the [*Seibert*] situation where it's so close in time that it's not like the [*Oregon v. Elstad* (1985) 470 U.S. 298, 318] case at all ... ."

The trial court concluded, "[b]ased on the agreement as to the recited facts," that "there is no *Miranda* violation." The court stated "I think we can clean this up if it's agreed that [the prosecution] would at least excise" a portion of the pre-advisement section of the Gombos and Ainsworth interrogation. The transcript of that interrogation accompanying the audio recording admitted at trial and played for the jury ultimately omitted all pre-advisement statements.

2. Defendant Did Not Preserve His Appellate Argument

On appeal, defendant argues that a threat and a promise made all of his statements to Gombos and Ainsworth involuntary and inadmissible. He contends he was coerced into speaking with Montalbo and Sulay because he was told by correctional officers that

[8] On two occasions, defense counsel stated that he was not arguing the encounters with officers were involuntary. When the trial court stated it seemed like the interrogation by Gombos and Ainsworth was "a voluntary encounter, a voluntary exchange of information," defense counsel interjected that "they did not pull him out of the jail against his will ... ." The court later sought defense counsel's agreement that the Gombos and Ainsworth interrogation was "a voluntary encounter" and defense counsel responded: "If by 'voluntary' you mean it's not coerced in a sense, I will agree."

he would have to participate in a debriefing interview as a condition of leaving N unit. Defendant also argues that he was promised by Montalbo and Sulay that no information he provided would be used to form the basis for any criminal prosecution. Defendant contends that because Gombos and Ainsworth never rescinded that promise when they interrogated him, defendant could reasonably believe that the promise of immunity still applied.

Defendant did not make any arguments based upon a threat or promise in the trial court, instead focusing solely on the conduct of Gombos and Ainsworth. Because defendant did not preserve those arguments, our review is confined to whether defendant's trial counsel provided ineffective assistance in not objecting on those grounds.

3. The Record is Inadequate to Show Deficient Performance

To prevail on a claim of ineffective assistance, defendant must show both that his trial counsel's performance was deficient and that he was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216–217.) To prove prejudice, defendant must affirmatively show a reasonable probability of a more favorable result had it not been for his trial counsel's error. (*Id.* at pp. 217–218.) A defendant who raises ineffective assistance of counsel on direct appeal "must establish deficient performance based upon the four corners of the record." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) "If the record does not disclose why counsel acted or failed to act in the manner challenged, then, unless counsel was asked for and failed to provide an explanation or there could be no satisfactory explanation, we reject the claim on appeal and affirm the judgment. Under such circumstances, the claim is more appropriately made in a petition for habeas corpus." (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 194 .)

Defendant argues that a threat and a promise rendered his statements involuntary, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. (Citing *People v. Neal* (2003) 31 Cal.4th 63, 84 (*Neal*) ["Promises and

threats traditionally have been recognized as corrosive of voluntariness."].) But the record does not contain direct evidence of either the threat or the promise. Defendant argues the threat came in the form of statements by correctional officers that he could not leave N unit unless he agreed to disclose details about the Norteño gang. His argument is based on statements he made during the Gombos and Ainsworth interrogation, where defendant stated that he had told correctional officers in the very early morning of August 9 that he was in a "life and death situation" based on learning that another inmate had given orders to slash him and the officer "didn't want to take it." Defendant apparently also went to the correctional officers a second time later that night, and told them he was facing a "life and death situation," but was told by an officer: " 'I don't care. I still need, I still need to know more.' " As for the promise, defendant focuses on the following sentence from the prosecution's opposition to defendant's motion in limine: "Prior to that [Montalbo/Sulay] interview it was agreed by all parties that the information provided would not be used to form the basis of a criminal prosecution."

When the voluntariness of a statement is properly raised in the trial court, the trial court makes a voluntariness finding and the reviewing court applies "an independent standard of review, doing so 'in light of the record in its entirety, including "all the surrounding circumstances—both the characteristics of the accused and the details of the [encounter]"... .' " (*Neal*, *supra*, 31 Cal.4th at p. 80.) When raised for the first time on appeal through a claim of ineffective assistance, determining whether trial counsel was deficient for failing to object to admission of involuntary statements likewise requires a fact-specific inquiry to determine the probable merit of such an argument.

In this case, the record does not contain the circumstances of either defendant's removal from N unit or his interview by Montalbo and Sulay. The record does not disclose what correctional officers told defendant, apart from defendant's hearsay recitation that an officer told him " 'I still need to know more.' " Even if evidence of coercion were in the record, defendant also states that he was promised immunity during

the Montalbo and Sulay interview, which would dissipate the coercive effect of any earlier threat by correctional officers. And while a promise of immunity might affect the voluntariness of a defendant's later statements to police, the record does not show what defendant was promised. Without more information, we cannot determine whether defendant could have reasonably construed any such promise as extending to the Gombos and Ainsworth interrogation such that defendant's trial counsel would have been deficient for failing to challenge the admissibility of defendant's statements on that basis.

Given the gaps in the record on appeal and evidence that defendant's trial counsel listened to the Montalbo and Sulay interview, "the record fails to eliminate" the possibility of a tactical reason for trial counsel's failure to object. (*People v. Kraft* (2000) 23 Cal.4th 978, 1068–1069 [rejecting ineffective assistance claim on direct appeal about trial counsel's failure to request removal of juror on ground that juror's brother knew the victim where record reflected trial counsel had "reviewed his notes and [the juror's] voir dire" before trial court's hearing on potential removal of juror].) Because the record on direct appeal is inadequate to demonstrate ineffective assistance, defendant's argument must fail.

B. DENIAL OF BIFURCATION OF GANG ISSUES

Defendant argues the trial court abused its discretion by denying his motion to bifurcate his trial for counts two and three (possession of a weapon in jail and assault with a deadly weapon) from the trial on count one (active participation in a criminal street gang) as well as the gang enhancement allegations associated with counts two and three.

In the motion in limine, defense counsel argued that evidence about defendant's gang involvement was irrelevant to counts two and three and would unduly prejudice defendant. The trial court denied that motion, finding the gang evidence relevant to prove "motive and provide context" for counts two and three and not unduly prejudicial.

Trial courts have discretion to bifurcate trial of separate counts and also to bifurcate trial of a gang enhancement from trial of guilt on a single count. (§ 954 [court may "order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately"]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048–1049 (*Hernandez*).) Bifurcation might be warranted if predicate offenses introduced as evidence of a " 'pattern of criminal gang activity' " (§ 186.22, subd. (e)) are unduly prejudicial, or if gang evidence relating to a defendant is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Hernandez,* at p. 1049.) However, gang evidence is often relevant to help "prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Ibid.*) We review the trial court's denial of bifurcation for abuse of discretion, mindful that defendant had the burden to clearly establish a substantial danger of prejudice justifying bifurcation. (*Id.* at pp. 1050–1051.)

Defendant argues the gang evidence was irrelevant to defendant's motive because the motivation for the attack was Bates's purported assault on Ybarra's niece as well as Ybarra's questioning of defendant's commitment to the gang if he did not participate. Defendant also argues that the gang evidence was unduly prejudicial because Chappell's testimony that defendant was a high-ranking Norteño, "who could only have achieved that rank through violence ... , was designed to transform this apparently private quarrel into a gang crime." However, even if the attack on Bates was motivated in part by Bates's assault on Ybarra's niece, the gang evidence was relevant to several other possible motivations for the attack, including reinforcing discipline and hierarchy in the gang as well as demonstrating the gang's strength by carrying out an attack in front of a correctional officer. As for Ybarra's challenge to defendant's heart, gang evidence was relevant to explain how a gang member might respond to a direct challenge to a gang

member's allegiance to the gang. Given how intertwined the gang evidence was with the substantive offenses, defendant did not show a substantial danger of undue prejudice, and the trial court therefore did not abuse its discretion by denying defendant's motion to bifurcate.

C. GANG ISSUES

Defendant makes several arguments on appeal that are based on Sergeant Chappell's testimony as a gang expert. Defendant argues the trial court erred by admitting: testimonial hearsay as gang expert basis evidence, which violated the Sixth Amendment's confrontation clause; contents of court records to prove a pattern of criminal gang activity, which violated the confrontation clause; testimony regarding defendant's mental state; and unduly prejudicial evidence about defendant's prior convictions. Defendant also contends there was insufficient evidence to support the active participation gang count and the gang enhancements.

1. Gang Expert Chappell's Testimony

Sergeant Morgan Chappell testified as an expert regarding gang recognition, practices, and culture. Chappell explained that in his role as a gang detective in Watsonville he investigated almost all gang-related crimes in that city between 2009 and 2012. He further developed his expertise by reviewing police, jail, and prison records and talking to current and former gang members as well as other police officers.

According to Chappell, the Norteños are a criminal street gang whose primary activities include group assault, assault with a deadly weapon (including guns and knives), possession of weapons, and possession of controlled substances. Chappell described violence as an important feature of Norteño life, used to enhance one's reputation and status as a gang member. He testified that respect (including by being feared) is also important, and that committing violence and making money for the gang are two ways to increase one's reputation. Chappell further testified that gang tattoos,

especially ones that cannot be covered (such as tattoos on the face), indicate a high level of commitment to the gang.

The Nuestra Familia is the supreme Norteño gang in California, with authority over all other Norteño gangs. In jail, the highest ranking Norteño would be in charge of the other Norteño inmates. Norteños regularly discipline members of their own gang by assaults and other means. Attacking another gang member in front of a correctional officer would demonstrate a willingness to commit violence on behalf of the gang and would also benefit the gang. When asked how a gang member would respond if another gang member challenged his heart or allegiance to the gang, Chappell said that such a direct challenge would require action in response in order to preserve reputation. Chappell stated he did not believe a Norteño would fake an attack because faking an attack would serve no useful gang purpose and showing mercy would be detrimental to the gang's reputation.

During the prosecutor's direct examination of Chappell, the trial court took judicial notice of court files for several previous criminal convictions of defendant and others, informing the jury they could consider them as true. The court took judicial notice of the following convictions for individuals other than defendant: active participation in the Clifford Manor Locos street gang and possession of a firearm by Alvaro Melendrez in 2011; active participation in the Norteño street gang and assault with a deadly weapon by Carlos Zuniga in 2010; and possession of a controlled substance by Ybarra in 2008. The court also took judicial notice of defendant's prior convictions for: assault with a deadly weapon for the benefit of a criminal street gang in 1995;[9]

[9] At a conference with counsel outside the presence of the jury, the court noted that it inadvertently disclosed the nature of the assault with a deadly weapon conviction even though the court had previously indicated it would sanitize that felony. Defense counsel stated that he did not "want to have it reemphasized and obviously a curative instruction at that time would have probably highlighted it more than what actually happened."

possession of a firearm by a felon in 1999; and possession of a controlled substance in 2008.

In addition to those conviction records, Chappell testified about several police investigations, based on information he had read in police reports and an F.I. card.[10] Many of the investigations Chappell testified about involved defendant's fellow inmate Jesse Ybarra, including a number of traffic stops. For instance, Chappell testified (based on an F.I. card) that "Ybarra was stopped by a police officer[,] questioned about his gang affiliations and freely admitted to the officer he was a Norteno." Two investigations Chappell described mentioned defendant, including one where defendant and "another Clifford Manor Loco gang member Porfirio Mendoza were in a vehicle," fled when an officer tried to stop the car, and were eventually apprehended. In another investigation, defendant's name was apparently found on "a long list of Watsonville gang members" at the home of a "high ranking gang member in the City of Watsonville." On several occasions during Chappell's testimony, the trial court provided variations of the following admonition: "Sergeant Chappell [a]s an expert witness is permitted to rely on reports of others. Specifically police reports. ... You can consider this not for the fact these items that are displayed here are true but Sergeant Chappell is relying on these reports and they form part of the basis of his opinion. So you can consider this only, this information only for the purposes of determining what weight to give to Sergeant Chappell's opinion."

Chappell also testified about other investigations based on his personal knowledge. Chappell was one of the arresting officers in the case resulting in defendant's 2008 conviction for possession of a controlled substance. Chappell testified that Ybarra and defendant were together when they were arrested by Chappell and other

[10] Chappell explained that an F.I. (field interview) card "is a small three-by-five card officers use in the field to quickly jot down some information that they get from subjects who they contact in a routine patrol."

officers at a motel for possessing methamphetamine. Chappell also personally conducted a parole search of an active Norteño gang member's house in 2010 and found "a small piece of paper with a couple of names on it and two of those names were [defendant] and Jesse Ybarra."

Based on defendant's convictions, his tattoos, and his placement in the N unit, Chappell offered his expert opinion that defendant was an active participant in the Clifford Manor Locos subset in August 2011. Regarding his placement in N unit, Chappell elaborated that "[t]here's no way he can walk around with these tattoos in 'N' unit and people know who he is if he was no longer an active Norteño."

Regarding the attack on Bates, Chappell testified it was consistent with the way Norteños would attack someone. He explained that it was a coordinated attack, they attacked from two sides to cut off avenues of escape, and they concealed their weapons and moved nonchalantly before the attack.

2. Gang Expert Basis Evidence and the Confrontation Clause

Defendant argues the trial court violated his Sixth Amendment right to confront and cross examine witnesses by allowing prosecution gang expert Sergeant Chappell to rely on and testify regarding testimonial hearsay.

In the trial court, defendant's motion in limine on this point sought to limit the matter upon which the prosecutor's gang experts could rely at trial. Defense counsel requested that the court limit the expert testimony to prevent the experts from including "extensive, prejudicial hearsay" recitations and provide a limiting instruction. The court determined that the gang experts could not render any opinions regarding defendant's specific intent related to the charged crimes but could otherwise testify regarding the culture, habits, signs, symbols, and attire associated with the Norteño street gang. The court also agreed to instruct the jurors that they could not consider hearsay relied on by the expert for its truth. Defendant's in limine motion did not raise confrontation clause

issues but defense counsel mentioned "*Crawford*"[11] during some of his hearsay objections to Chappell's testimony, preserving the confrontation clause issue.

a. Basis Evidence and the Confrontation Clause

The Sixth Amendment to the United States Constitution's confrontation clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." (U.S. Const., 6th Amend.; see also Cal. Const., art. I, §§ 15, 24.) In *Crawford*, the Supreme Court decided that the confrontation clause bars admission of "testimonial hearsay" statements of a witness unless that witness "was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford*, at pp. 53–54.) "Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) The definition of "testimonial" is less certain.

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the court confirmed statements "are testimonial when the circumstances objectively indicate that there is no ... ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822.) However, the *Davis* court declined to "produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial," leaving that determination for future cases. (*Ibid.*) In *Michigan v. Bryant* (2011) 562 U.S. 344, the court indicated that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony," but did not elaborate further except to state that in "making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." (*Id.* at pp. 358–359.)

[11] Referring to *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

In *Williams v. Illinois* (2012) 567 U.S. __, 132 S.Ct. 2221 (*Williams*), the Supreme Court considered whether *Crawford* bars "an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify." (*Id.* at p. __ [132 S.Ct. at p. 2227].) The *Williams* court examined whether an expert from a state laboratory could rely on a DNA report of a rape victim's vaginal swab prepared by an independent laboratory in rendering an opinion that the defendant's DNA profile (drawn from the defendant after an earlier, unrelated arrest) matched the DNA found on the vaginal swab. In a 4–1–4 opinion, the court held that admission of the expert's testimony did not violate the confrontation clause.

A plurality of four justices in *Williams* found that the DNA report was not offered for its truth, and that even if the basis evidence was offered for its truth, it was not testimonial. (*Williams*, *supra*, 567 U.S. at p. __ [132 S.Ct at p. 2228] (plur. opn. of Alito, J., joined by Roberts, C. J., Kennedy & Breyer, JJ.).) The DNA report was "produced before any suspect was identified"; was sought "for the purpose of finding a rapist who was on the loose" rather than to obtain evidence against the defendant; and was "not inherently inculpatory." (*Id.* at p. __ [132 S.Ct at p. 2228].) Justice Thomas agreed with the plurality that the "basis evidence" was not testimonial, but reasoned it was not testimonial because it "lack[ed] the solemnity of an affidavit or deposition" and, "although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." (*Id*. at p. __ [132 S.Ct. at p. 2260] (conc. opn. of Thomas, J.).) The remaining four justices joined in a dissent authored by Justice Kagan; they rejected the idea that the expert's testimony was not offered for its truth. (*Id.* at pp. __ [132 S.Ct. at pp. 2265, 2268] (dis. opn. of Kagan, J.).) Justice Thomas agreed with the dissenting justices that the testimony was offered for its truth, reasoning that "there was no plausible reason for the introduction of [the hearsay] statements other than to establish their truth ... ." (*Id.* at p. 2256 (conc. opn. of Thomas, J.).)

Cases involving a confrontation clause claim regarding gang expert basis evidence are pending before the California Supreme Court. (E.g., *People v. Sanchez*, review granted May 14, 2014, S216681; *People v. Archuleta*, review granted June 11, 2014, S218640.) In *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), the California Supreme Court determined that an expert may base his or her opinion on otherwise inadmissible hearsay evidence and can state the basis for that opinion on direct examination. (*Id*. at p. 618, citing Evid. Code, §§ 801, subd. (b), 802.) The court reasoned that "a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact." (*Gardeley*, at p. 619.) *Gardeley* did not address a confrontation clause claim, nor whether testimonial hearsay can be admitted through a gang expert to prove elements of a gang enhancement such as the "pattern of criminal gang activity." (§ 186.22, subd. (f).)

b. Analysis

The only evidence that arguably constituted testimonial hearsay was Chappell's summaries of police investigations, which were based on information he learned from police reports and an F.I. card. (See *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 664 ["A document created solely for an 'evidentiary purpose,' ... made in aid of a police investigation, ranks as testimonial."].) However, with the exception of two summaries, the police investigations Chappell summarized involved other individuals (including Ybarra) and did not mention defendant. And one of the summaries about defendant's name being found on a list of names at a Norteño gang member's house was cumulative of Chappell's testimony about having personally found defendant's name on a list at a different Norteño gang member's house. The trial court repeatedly instructed the jurors not to consider the summaries for their truth and admonished them to "consider this information only for the purposes of evaluating what weight you want to give to Sergeant Chappell's opinion."

Evidence of those police investigations was also not necessary to prove the requisite "pattern of criminal gang activity" (§ 186.22, subds. (e) & (f)). (See *Gardeley*, *supra*, 14 Cal.4th at p. 625 [charged offense can be one of the two predicate offenses required to show a pattern of criminal gang activity].) The court took judicial notice of court records for convictions unrelated to the investigations Chappell summarized that were admissible for the purpose of proving a pattern of criminal gang activity. Further, Chappell's testimony about one of those pattern offenses (defendant's 2008 conviction for possession of a controlled substance) was based on Chappell personally having arrested defendant. Any error in admitting testimonial hearsay was thus harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

3. Judicial Notice of Predicate Offenses and the Confrontation Clause

Defendant claims that his Sixth Amendment right of confrontation was violated when the court took judicial notice of other individuals' convictions to support the active participation gang charge as well as the gang enhancements to the other counts.[12] The conviction records were offered to show the Norteño gang's "pattern of criminal gang activity" (§ 186.22, subd. (a)), defined in section 186.22, subdivision (e) as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" offenses listed in that subdivision.

Defendant focuses on the records of those cases rather than on any narrative statements by the gang expert *about* those records, arguing for example that "evidence that Zuniga pled guilty ... in a prior case deprived appellant of the opportunity to confront Zuniga" about whether he actually committed the prior crime. Though he does not identify what statements he deems testimonial, it appears he claims that the fact of each

[12] Defendant does not challenge admission of his own prior convictions on confrontation clause grounds, conceding that "use against a defendant of his own prior conviction obtained by a guilty plea does not deny the right to confrontation ... ."

prior conviction constitutes a testimonial statement that should have been excluded absent confrontation.

Defendant relies primarily on *Kirby v. United States* (1899) 174 U.S. 47 (*Kirby*), where the Supreme Court reversed Kirby's conviction for receipt of stolen goods when the prosecution's only evidence that the goods were stolen was the record of a previous criminal case where two individuals pleaded guilty to stealing the goods Kirby later received. (*Id.* at pp. 53–54, 60.) The court determined that the prosecution's conduct violated the confrontation clause, reasoning that "a fact which can be primarily established only by witnesses cannot be proved against an accused -- charged with a different offense, for which he may be convicted without reference to the principal offender -- except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." (*Id.* at p. 55.)

Kirby is factually distinguishable. The *Kirby* court held that "one accused of having received stolen goods with intent to convert them to his own use, knowing at the time that they were stolen, is not within the meaning of the Constitution, confronted with the witnesses against him when the fact that the goods were stolen is established *simply by the record of another criminal case* with which the accused had no connection and in which he was not entitled to be represented by counsel." (*Kirby*, *supra*, 174 U.S. at p. 60, italics added.) Here, the existence of the Norteño gang as well as their pattern of criminal gang activity was supported by other evidence in addition to the conviction records. The court admitted defendant's prior convictions for assault with a deadly weapon for the benefit of a criminal street gang, felon in possession of a firearm, and possession of a controlled substance. Those convictions are among the offenses that can support a showing that a criminal street gang is "engaged in a pattern of criminal gang activity ... ." (§ 186.22, subds. (f), (e)(1), (e)(4), (e)(23).) The jury also heard Ward's testimony about

the "CML" tattoos on both defendant and Ybarra, as well as Chappell's opinion that defendant could not have been placed in N unit without being attacked if he was no longer a Norteño.

The conviction records here also do not meet the *Crawford* definition of testimonial, which requires statements to have some degree of solemnity as well as having the primary purpose of establishing or proving past facts relevant to a later criminal prosecution. (See *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 309–310.) As court records, the conviction records are sufficiently solemn or formal. However, reviewed objectively these records were not created for the primary purpose of establishing past facts relevant to later criminal prosecution. Their primary purpose is administrative; they memorialize the convictions for case, prisoner, probationer, and parolee tracking purposes. Though they served the additional purpose of establishing past facts against defendant at trial, defendant does not show that was the *primary* purpose for their creation. (Cf. *People v. Moreno* (2011) 192 Cal.App.4th 692, 710–711 [finding documents in section 969b packet (regarding Moreno's prior convictions) non-testimonial because they were not created for the primary purpose of providing evidence in a subsequent prosecution and instead were created primarily for administrative purposes]; see also *Melendez-Diaz*, *supra*, 557 U.S. at p. 324 [noting public records are generally admissible absent confrontation because, "having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial"].)

The trial court therefore did not err by taking judicial notice of other individuals' prior conviction records.

4. Prosecution's Use of Hypothetical Questions to Gang Expert

Defendant argues that the prosecution's gang experts offered a profile of the mental state shared by all Norteño gang members and that, "as a profile of a non-existent generic entity, the Norteño mind and, by inference, a profile of appellant's mind," the

testimony "exceeds the witnesses' expertise and constitutes mere speculation about whether appellant possessed the required mental state" for the charged crimes and enhancements. Trial courts have broad discretion to decide the admissibility and scope of expert testimony and we review those decisions for abuse of discretion. (*People v. Brown* (2014) 59 Cal.4th 86, 101.) Though the People claim defendant forfeited this issue by failing to object during trial to specific statements by the experts, we will review the issue because defense counsel moved in limine to limit the scope of gang expert testimony and the court informed the parties in ruling on that motion that the experts would not be allowed to render opinions regarding defendant's specific mental state.

In *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), the court considered "the propriety of permitting the gang expert to respond to the hypothetical questions the prosecution asked regarding whether defendants' assault ... was gang related." (*Id.* at p. 1044.) The *Vang* court reaffirmed that testimony about the culture and habits of criminal street gangs is a proper subject for expert testimony because it is " 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [(Evid. Code, § 801, subd. (a).)]" (*Vang*, at p. 1044.) The court noted it has consistently held that gang experts may render opinions on hypothetical questions based on the facts of the particular case. (*Id.* at p. 1045, citing *Gardeley*, *supra*, 14 Cal.4th at pp. 618–619; *People v. Ward* (2005) 36 Cal.4th 186, 209; see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3 ["use of hypothetical questions is proper" when questioning expert witnesses].) The main limitation on hypothetical questions is that they " 'must be rooted in facts shown by the evidence ... .' " (*Vang*, at p. 1045, quoting *Gardeley*, at p. 618.) The *Vang* court explained that although an expert may not express an opinion on a specific defendant's guilt because the jury is as competent as an expert to weigh the evidence and determine guilt, an expert can "express an opinion, based on hypothetical questions that tracked the evidence, whether the [charged crime], if the jury found it in fact occurred, would have been for a gang purpose." (*Vang*, at p. 1048.) Once that

opinion is rendered, the "jury still plays a critical role" by deciding whether to credit the expert's opinion at all and by determining "whether the facts stated in the hypothetical questions are the actual facts" (assessing whether any differences between the hypothetical facts and the actual facts are significant). (*Id.* at p. 1050.)

Defendant's argument that the prosecution purported to profile "the Norteño mind, and by implication, the mind of" defendant is unsupported by the record. Defendant pieces together general statements Chappell made at different points during his testimony and suggests that those statements along with Chappell's opinion that defendant was a Norteño combined to constitute improper testimony regarding defendant's specific motivation or intent regarding the attack on Bates. To the contrary, Chappell's testimony related generally to the culture and habits of the Norteño street gang and was therefore proper expert testimony. (*Vang, supra*, 52 Cal.4th at p. 1044.) Chappell offered an opinion regarding the characteristics of the Norteño street gang, including their primary activities (assault, possession of controlled substances, etc.) as well as the importance of violence and respect in Norteño culture. Chappell also opined that defendant was an active Norteño, based on a number of factors. When shown the video of the attack, Chappell stated it was consistent with a gang attack because it was coordinated, the assailants surrounded the victim to cut off escape routes, and they concealed their weapons and moved nonchalantly before the attack.

Defendant takes particular issue with Chappell's testimony that a Norteño would not fake an attack, arguing that Chappell "presumed to know that [defendant] was lying when he claimed to have faked his participation in the attack on Bates so as to be in a position to protect himself from Ybarra." However, Chappell's testimony regarding whether Norteños fake attacks was general, did not mention defendant, and certainly did not express an opinion about whether defendant lied about faking the attack. Chappell's entire explanation as to why he believed "a Norteño" would not fake an attack was: "It would serve no purpose and again they would be looked at as weak if they can attack, to

fake a battle in a war wouldn't make any sense." To paraphrase *Vang*, although the opinion, if found credible, might together with other evidence cause the jury to discredit defendant's claim that he faked the attack, that aspect goes to the testimony's probative value, not its admissibility. (*Vang*, *supra*, 52 Cal.4th at pp. 1048–1049.)

The cases defendant relies on are distinguishable. In *People v. Robbie* (2001) 92 Cal.App.4th 1075 (*Robbie*), the trial court allowed an expert to testify about conduct the expert deemed " 'consistent with a certain type of rapist' " and to answer hypothetical questions meant to show that the defendant's conduct was consistent with that type of rapist. (*Id.* at p. 1081.) Among other things, the expert testified that the type of rapist she described does not use force and " 'the offender commonly will try to please the victim sexually, will try to make her feel good.' " (*Id.* at p. 1083.) The expert also testified that the "offender may believe the sexual encounter is consensual because he has a 'cognitive distortion,' " and that the offender will often ask the victim questions that "indicate the offender is rationalizing the event as consensual." (*Ibid.*) The expert acknowledged that "the conduct she described was equally consistent with consensual activity." (*Id.* at p. 1083.)

The Court of Appeal in *Robbie* found the trial court had abused its discretion in allowing the foregoing profile evidence. (*Robbie*, *supra*, 92 Cal.App.4th at p. 1084.) The court provided the "syllogism underlying profile evidence: criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal." The flaw in the expert's opinion in *Robbie* was that the profile evidence she described was "consistent with both innocent and illegal behavior," meaning that the testimony required "the jury to accept an erroneous starting point in its consideration of the evidence." (*Id.* at p. 1085.) The court also noted that the expert improperly testified about the cognitive thought processes of the defendant, which "exceeded the scope of her proffered testimony." (*Id.* at p. 1087.)

Robbie is factually distinguishable. Unlike the testimony in *Robbie,* Chappell's testimony largely focused on the ways that gang members break the law and thus was not equally consistent with law-abiding activities. (See *People v. Smith* (2005) 35 Cal.4th 334, 358 ["Profile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt."].) Further, while Chappell described an explanation for his belief that a Norteño would not fake an attack, that testimony was within the scope of Chappell's expertise and involved much less exploration of cognitive processes than the *Robbie* expert's testimony about an offender's actions being motivated by a " 'cognitive distortion' ... ." (*Robbie, supra*, 92 Cal.App.4th at p. 1082.)

Even if Chappell's testimony could be considered profile evidence, "profile evidence does not describe a category of always-excluded evidence; rather, the evidence ordinarily is inadmissible 'only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative.' " (*People v. Prince* (2007) 40 Cal.4th 1179, 1226.) The testimony was relevant to determining the gang charge and gang enhancements, had a foundation based on Chappell's experience as a gang detective, and was not shown by defendant (either at trial or on appeal) to be more prejudicial than probative.

Defendant's reliance on *People v. Bordelon* (2008) 162 Cal.App.4th 1311 (*Bordelon*), is misplaced. In *Bordelon*, the court affirmed the denial of Bordelon's request to call an expert witness who, taking hypothetical facts based on the case as true, would provide an opinion about the hypothetical defendant's specific intent. (*Id.* at p. 1326.) The court found such testimony would violate section 29, which prohibits experts from testifying regarding "whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged." (§ 29; *Bordelon*, at p. 1327.)

Defendant notes the court in *Vang* cited *Bordelon* for the proposition that a party may not circumvent a statutory prohibition on expert testimony about specific subject

matter by using hypothetical questions. (*Vang*, *supra*, 52 Cal.4th at p. 1052.) However, the *Vang* court expressly states *Bordelon* and other cases "are inapposite" regarding gang testimony because "no statute prohibits an expert from expressing an opinion regarding whether a crime was gang related." (*Ibid*.) Defendant attempts to overcome that conclusion by claiming Chappell's testimony violated section 29 by opining about defendant's mental state. But Chappell never testified regarding defendant's mental state and gave an opinion only about whether the attack on Bates was consistent with a Norteño attack.

Finally, defendant claims Chappell's testimony amounted to evidence of what "a particular Norteño or all Norteños think" and was therefore similar to the " 'generalized tendency of some groups of witnesses to lie,' " which the court in *People v. Johnson* (1993) 19 Cal.App.4th 778 (*Johnson*) found to be improper subject matter for expert testimony. (Quoting *Johnson*, at p. 786.) *Johnson* involved the denial of a defense request that an expert be allowed to testify that imprisoned inmates sometimes lie, claim credit for crimes they do not commit, and provide false testimony "in return for promised benefits from the state." (*Johnson*, at p. 786.) The Court of Appeal found no abuse of discretion, reasoning that the "proposition that prison inmates may lie certainly is not outside the common understanding of jurors," and that such testimony is therefore "irrelevant and not the subject of legitimate scientific evidence from expert witnesses." (*Ibid.*) Unlike the proposed testimony in *Johnson*, it is settled that testimony about the culture and habits of street gangs is outside the common experience such that expert opinion would help the trier of fact. (*Vang, supra*, 52 Cal.4th at p. 1044, citing Evid. Code, § 801, subd. (a).) Because Chappell's testimony did not exceed that scope, the trial court did not abuse its discretion in allowing it.

5. Admissibility of Defendant's Prior Convictions

Defendant argues the trial court erred by denying his motion in limine to exclude evidence of his prior convictions as unduly prejudicial under Evidence Code section 352

and as improper character evidence under Evidence Code section 1101. During Chappell's testimony, the court took judicial notice of three of defendant's prior convictions. We review the trial court's decision to admit the prior convictions for an abuse of discretion. (*People v. Leon* (2008) 161 Cal.App.4th 149, 164.)

Before trial, the trial court determined all five of defendant's prior convictions were admissible. Regarding defendant's 1995 conviction for assault with a deadly weapon for the benefit of a criminal street gang, the court stated it would allow the prosecution to characterize it as a "felony offense for the benefit of a criminal street gang" to reduce the prejudicial effect of the evidence and the risk that the jury might improperly conclude that defendant had a propensity for violence.

At trial, the prosecution only sought judicial notice of three of the five convictions.[13] Before taking judicial notice of those convictions, the court instructed the jurors that they could consider the evidence for the limited purposes of determining whether defendant "acted with the intent, purpose and knowledge that are required to prove the charged" active gang participation count and the gang enhancements to the other counts, as well as to determine the weight to give Chappell's opinions. The jury was instructed not to consider or discuss this evidence as it "relates to whether or not [defendant] is a person of bad character or ... has some disposition to commit crimes." When the court actually took judicial notice of the 1995 conviction, it inadvertently disclosed to the jury that the conviction was for assault with a deadly weapon rather than describing it more generally as it had apparently intended. The jury instructions provided before deliberations included CALCRIM No. 1403, which reminded the jurors they could consider defendant's prior convictions for the limited purposes of judging Chappell's testimony and deciding whether defendant "acted with the intent, purpose, and knowledge" necessary to convict him for the charged counts and enhancements.

[13] Chappell referred generally to a fourth conviction defendant had suffered but the trial court did not take judicial notice of that conviction.

Defendant fails to show an abuse of discretion. Evidence of defendant's prior convictions was relevant to determine his intent, purpose, and knowledge regarding the charged crimes. For example, defendant's 1995 conviction for assault with a deadly weapon for the benefit of the Norteño criminal street gang showed that he was aware of that gang's existence and had previously committed a crime for the benefit of the gang. Though defendant claims evidence of his own convictions was cumulative of the other individuals' gang-related convictions, his convictions were more probative than the convictions of others on the issue of whether defendant himself had the requisite knowledge of and intent to promote the Clifford Manor Locos specifically and Norteños more generally. (See *People v. Tran* (2011) 51 Cal.4th 1040, 1048 ["In prosecutions for active participation in a criminal street gang, the probative value of evidence of a defendant's gang-related separate offense ... provides direct evidence of a predicate offense, that the defendant actively participated in the criminal street gang, and that the defendant knew the gang engaged in a pattern of criminal gang activity."].) The trial court did not abuse its discretion in determining that their probative value was not *substantially* outweighed by a danger of undue prejudice.

As for the court's mistake in disclosing that the 1995 conviction was for assault with a deadly weapon, defense counsel did not request a curative instruction, stating that he did not want the matter reemphasized. The trial court mitigated the possibility that the jury might consider the prior convictions evidence for an improper purpose by providing limiting instructions both before taking judicial notice and again as part of the instructions provided after the close of evidence. Though defendant appears to suggest that limiting instructions are "frequently useless," the "presumption is that limiting instructions are followed by the jury ... ." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

6. Sufficiency of Evidence for Gang Charge and Enhancements

Defendant contends that if the expert basis evidence was not admitted for its truth, there was insufficient evidence of defendant's involvement with the Clifford Manor

Locos subset of the Norteño street gang because "if the facts on which the opinion is based have not been shown to be true, the opinion itself lacks probative value." Though he acknowledges that the trial court took judicial notice of defendant's prior convictions as well as convictions of other gang members, he argues that those past convictions were insufficient to prove defendant was *still* an active participant in the gang when he attacked Bates or that the assault and possession counts were committed " 'for the benefit of, at the direction of, or in association' " with the gang. (§ 186.22, subd. (b)(1).)

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27 (*Lindberg*).) We will affirm a conviction if " ' "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " (*People v. Alvarez* (1996) 14 Cal.4th 155, 224, original italics.)

To find defendant guilty of count one, the jury had to conclude that defendant actively participated "in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang ... ." (§ 186.22, subd. (a).) To find true the gang enhancements, the jury had to conclude that defendant committed the substantive crimes in counts two and three "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members ... ."[14] (§ 186.22, subd. (b)(1).)

[14] " 'Criminal street gang' " is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated" in

As we have already discussed, Chappell testified that his opinions were based, among other things, on personally investigating almost all gang crimes that occurred in Watsonville between 2009 and 2012 as a gang detective and personally arresting defendant in 2008. Based on that experience, evidence of defendant's prior convictions, and defendant's placement in N unit, Chappell opined that defendant was an active participant in the Clifford Manor Locos subset of the Norteño street gang in August 2011. That opinion was related "to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" based on matter "perceived by or personally known to" Chappell, thereby making his expert testimony competent. (Evid. Code, § 801, subds. (a), (b).) The jury was able to judge his credibility and evaluate his testimony in light of all evidence introduced at trial, and we must defer to the jury's finding. (*People v. Little* (2004) 115 Cal.App.4th 766, 771 [courts "do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses"].)

In addition to Chappell's testimony, correctional officer Ward testified that a tattoo stating "CML," visible in defendant's booking photo, stood for Clifford Manor Locos, which he said was a "northern gang set in Watsonville." Within N unit, Ward testified that he believed defendant had seniority over other inmates, based on the incident where defendant caused another inmate to end a phone call. Detective Ainsworth also testified as a gang expert about defendant's tattoos. He opined that defendant's Familia Business and NF tattoos were associated with the Nuestra Familia,

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section 186.22, subdivision (e), and "having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) " '[P]attern of criminal gang activity' " includes "conviction of two or more" offenses listed in section 186.22, subdivision (e). (§ 186.22, subd. (e).) Those offenses include, among other things, assault with a deadly weapon (§ 245), possession of a firearm by a felon (§ 29800), and possession of a controlled substance for sale (Health & Saf. Code, § 11378). (§ 186.22, subds. (e)(1), (e)(4), (e)(31).)

suggesting to Ainsworth that defendant was a high ranking Norteño gang member. Defendant's statements during his interrogation about Ybarra challenging his heart and claiming he was not a gangster also support the jury's decision. The jury could infer from defendant's statements that he was motivated to attack Bates in order to show that he was still a gangster.

From the foregoing evidence, a rational trier of fact could have found that defendant was an active participant in a criminal street gang and that he possessed a weapon in custody and committed assault with a deadly weapon for the benefit of that gang. (*Lindberg, supra,* 45 Cal.4th at p. 27.)

D. SENTENCING ENHANCEMENTS

Defendant argues that the trial court violated section 1170.1, subdivision (f) by imposing two enhancements (§§ 667, subd. (a)(1) & 186.22, subd. (b)(1)(B)) that were both based on his use of a dangerous or deadly weapon in assaulting Bates. The Attorney General argues that the trial court properly imposed both enhancements because the section 667, subdivision (a)(1) enhancement was "based on [defendant's] status as a repeat offender" and therefore falls outside the section 1170.1, subdivision (f) limitation.

Section 1170.1, subdivision (f) provides, in relevant part: "When two or more enhancements may be imposed for ... using a dangerous or deadly weapon ... in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." The enhancements defendant contends fall within the section 1170.1, subdivision (f) limitation are a five-year section 667, subdivision (a)(1) enhancement for committing a serious felony after having been convicted of a prior serious felony, and a five-year section 186.22, subdivision (b)(1)(B) enhancement for committing a serious felony for the benefit of a criminal street gang.

At the court trial on the sentencing enhancements, the trial court found true the allegation that defendant had a prior serious felony conviction and imposed a section 667, subdivision (a)(1) enhancement. The trial court did not specify the basis for its implicit

finding that defendant's current felony was serious.[15] At sentencing, defense counsel argued section 1170.1, subdivision (f) applied because "the current offense is an assault with a deadly weapon which involved the use of a weapon." The trial court concluded that section 1170.1, subdivision (f) did not apply because the section 667, subdivision (a)(1) "status enhancement is not an enhancement that I'm imposing because [defendant] was armed with or using a deadly or dangerous weapon" but rather "because [defendant] was found guilty of a serious felony at a time when he had a prior serious felony conviction."

Defendant relies on *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*). Rodriguez was convicted of three counts of assault with a firearm (§ 245, subd. (a)(2)) and the jury found true two enhancements as to each count: a section 12022.5, subdivision (a) enhancement for personal use of a firearm while committing a felony, and a section 186.22, subdivision (b)(1)(C) enhancement for committing a violent felony for the benefit of a criminal street gang. (*Rodriguez*, at p. 505.) The court found there was "no question" that the section 12022.5, subdivision (a) enhancements for personally using a firearm fell "squarely within the limiting language" of section 1170.1, subdivision (f). (*Rodriguez*, at p. 508.) The court also found that the section 186.22, subdivision (b)(1)(C) enhancements "were likewise based on defendant's firearm use ... ." (*Rodriguez*, at p. 508.) That finding was based on the assault counts qualifying as violent felonies by virtue of the jury's finding that "defendant 'use[d] a firearm which use has been charged and proved' under section 12022.5." (*Rodriguez*, at p. 505, quoting § 667.5, subd. (c)(8).) Defendant thus "became eligible for this [section 186.22,

[15] The information originally contained a special allegation that defendant personally inflicted great bodily injury on Bates, which would have made the assault a serious felony under section 1192.7, subdivision (c)(8) as "any felony in which the defendant personally inflicts great bodily injury on any person ... ." But that special allegation was dismissed at some point, and the jury was not asked to make a finding regarding personal infliction of great bodily injury.

subd. (b)(1)(C)] 10-year punishment *only* because he 'use[d] a firearm which use [was] charged and proved as provided in ... Section 12022.5.' (§ 667.5, subd. (c)(8).)" (*Rodriguez*, at p. 509, original italics.) The court concluded that because "two different sentence enhancements were imposed for defendant's firearm use in each crime, section 1170.1's subdivision (f) requires that 'only the greatest of those enhancements' be imposed." (*Id.* at pp. 508–509.)

The Supreme Court reaffirmed *Rodriguez* in *People v. Le* (2015) 61 Cal.4th 416 (*Le*). In *Le*, a jury convicted a co-defendant (Yang) of assault with a semiautomatic firearm (§ 245, subd. (b)). The jury found true two enhancements related to that conviction: personal use of a firearm (§ 12022.5, subd. (a)(1)); and assault for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The charging document did not specify whether the People intended the five-year serious felony gang enhancement (§ 186.22, subd. (b)(1)(B)) or the 10-year violent felony gang enhancement (§ 186.22, subd. (b)(1)(C)) to apply. (*Le*, at pp. 420–421.) The lower court had found section 1170.1, subdivision (f) prohibited imposition of both the gang enhancement and the firearm use enhancement because "the jury's findings made defendant's assault a violent felony under section 667.5, thereby making the applicable enhancement the same 10-year term under 186.22, subdivision (b)(1)(C) that was at issue in *Rodriguez*." (*Le*, at p. 421.)

The Supreme Court noted in *Le* that the facts at issue were slightly different from those in *Rodriguez* because in *Le* the People "did not specify whether their complaint sought to impose the section 186.22 gang enhancement as a violent felony, serious felony, or other felony." (*Le, supra*, 61 Cal.4th 424.) The parties agreed that Yang's conviction qualified as a violent felony under section 667.5, subdivision (c). As for whether it was also a serious felony, the court determined that Yang's offense qualified as a serious felony under three assault-related crimes listed in section 1192.7, subdivision (c): a " 'felony in which the defendant personally uses a firearm' " (§ 1192.7, subd. (c)(8)); a " 'felony in which the defendant personally used a dangerous

or deadly weapon' " (§ 1192.7, subd. (c)(23)); and an " 'assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm' " (§ 1192.7, subd. (c)(31)). (*Le*, at p. 425.) The court reasoned that those "three provisions constitute the sole bases under which the conduct ... would be a serious felony, and they all clearly implicate the use of a firearm ... ." The court concluded that, under those circumstances, the gang enhancement was " 'imposed for being armed with or using ... a firearm' " (§ 1170.1, subd. (f)), "regardless of whether it qualified as a serious or violent felony" under section 186.22, subdivision (b)(1)(B) or instead under section 186.22, subdivision (b)(1)(C). (*Le*, at p. 425.)

The *Le* court acknowledged that "there are many other crimes designated as serious or violent felonies that do not necessarily involve the use of a firearm ... ." (*Le*, *supra*, 61 Cal.4th at p. 426.) However, the court reasoned that the existence of those other types of felonies did not prevent section 1170.1, subdivision (f) from applying to the facts in *Le* because Yang's offense could only be characterized as a serious or violent felony based on his use of a weapon. (*Le*, at p. 426.) The court also rejected the People's argument that "the section 186.22, subdivision (b)(1) gang enhancement required the *personal* use of a firearm," reasoning that section 1170.1, subdivision (f) "makes no such distinction" and "applies '[w]hen two or more enhancements may be imposed *for being armed* with *or using* a dangerous or deadly weapon or a firearm in the commission of a single offense.' " (*Le*, at p. 426, italics in original.) Because there was "no question that defendant Yang was armed" during the assault, the section 1170.1, subdivision (f) limitation applied. (*Ibid.*)

The trial court here found that the section 186.22, subdivision (b)(1)(B) enhancement applied because defendant's current assault with a deadly weapon conviction was a serious felony. Though it did not specify the basis for that finding, three categories of serious felony might apply on these facts: "assault with a deadly weapon by an inmate" (§ 1192.7, subd. (c)(13)); "any felony in which the defendant personally used

a dangerous or deadly weapon" (§ 1192.7, subd. (c)(23)); or "assault with a deadly weapon ... in violation of Section 245" (§ 1192.7, subd. (c)(31)). Because defendant's crime would qualify as a serious felony under any of those three applicable categories due to his use of a deadly weapon, *Rodriguez* and *Le* support defendant's argument that in the circumstances of this case the section 186.22, subdivision (b)(1)(B) gang enhancement falls within the limitation of section 1170.1, subdivision (f) as an enhancement "imposed for ... using a dangerous or deadly weapon ... ." (§ 1170.1, subd. (f).)

As for the section 667, subdivision (a)(1) enhancement, that subdivision provides that "any person convicted of a serious felony who previously has been convicted of a serious felony ... shall receive ... a five-year enhancement for each such prior conviction on charges brought and tried separately." Like section 186.22, subdivision (b)(1)(C), section 667, subdivision (a)(1) applies to *any* serious felony and therefore does not fall within the section 1170.1, subdivision (f) limitation in all cases. However, *Rodriguez* and *Le* demonstrate that section 1170.1, subdivision (f) applies to any enhancement that is imposed in a given case based on the defendant having been " 'armed with or using a dangerous or deadly weapon or a firearm ... .' " (See *Le*, *supra*, 61 Cal.4th at p. 426.) In this case, under each of the three possible serious felony categories applicable to defendant's conduct, his current assault with a deadly weapon felony could only be categorized as a serious felony because of his use of a deadly weapon. (See § 1192.7, subd. (c)(13), (c)(23), (c)(31).) Therefore, as applied here, the section 667, subdivision (a)(1) enhancement was an enhancement "imposed for ... using a dangerous or deadly weapon," meaning the section 1170.1, subdivision (f) limitation applies.

Because we find that section 1170.1, subdivision (f) applied to the two enhancements defendant identifies, "only the great[er] of those enhancements" should have been imposed. (§ 1170.1, subd. (f).) We will therefore reverse the judgment and remand the matter for resentencing. (*Rodriguez*, *supra*, 47 Cal.4th at p. 509 ["Remand

will give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f)."].)

E. DUPLICATE SENTENCES

Defendant argues that the trial court should have stayed his sentence for possession of a weapon because the jury's decision to convict might have been based on the possession and assault crimes occurring at the same time. Section 654 states that an "act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd (a).) If, "in committing various criminal acts, the perpetrator acted with multiple criminal objectives that were independent of and not merely incidental to each other, then he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.) We will affirm the trial court's decision that defendant's intent and objective in possessing a weapon was distinct from using it in the assault if the determination is supported by substantial evidence. (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585.)

The trial court found that defendant's possession of the weapon was "predominantly independent" from the attack on Bates because the weapon "was something that he had manufactured himself, was something that he relied on, utilized for protection, and also to carry out acts or impose discipline like what was done in this case." Defendant stated during his interrogation that he had a piece consisting of a plastic shampoo or lotion bottle with a screw on the end. Defendant claimed he had the shank for protection. During closing argument, the prosecutor argued defendant possessed the shank "to stab Marcus Bates" but also claimed that defendant had the shank "for a long

time" before the attack. The foregoing provides substantial evidence to support the trial court's decision.

F. CUMULATIVE ERROR

As we found only one possible error (Chappell's use of testimonial hearsay) and determined that error was harmless beyond a reasonable doubt, defendant's cumulative error claim must fail.

III. DISPOSITION

The judgment is reversed, and the matter is remanded for resentencing.

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Grover, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.

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